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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 1731

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JOLIET CONTRACTORS ASSOCIATION, A NON-PROFIT ILLINOIS CORPORATION, FOR ITSELF AND ON BEHALF OF ITS MEMBERS, AND I. N. R. BEATTY LUMBER COMPANY, ALEXANDER LUMBER CO., JOLIET LUMBER & FUEL COMPANY, LEACH BROTHERS, INC., HACKER-SIME COMPANY, ALL ILLINOIS CORPORATIONS, EDWARD M. NEWMAN, DOING BUSINESS AS THE NEW LUMBER COMPANY, E. DURBIN COLLINS AND CATHRYN H. COLLINS, CO-PARTNERS, DOING BUSINESS AS LYONS BROTHERS LUMBER & FUEL COMPANY, P. C. RYAN, T. F. RYAN, M. L. RYAN AND A. L. RYAN, CO-PARTNERS, DOING BUSINESS AS THOMAS F. RYAN COMPANY, AND ARNOLD R. WELSCH AND WALTER W. WELSCH, CO-PARTNERS, DOING BUSINESS AS JOLIET CASH AND CARRY LUMBER COMPANY,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

GLAZIERS' UNION LOCAL 27 OF THE BROTHERHOOD OF PAINTERS, DECORATORS AND PAPER HANGERS OF AMERICA,

Intervenor Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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JOLIET CONTRACTORS ASSOCIATION, ET AL.,
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vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

GLAZIERS' UNION LOCAL 27, ETC.,
Intervenor Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Joliet Contractors Association, a non-profit Illinois corporation, for itself and on behalf of its members, and I. N. R. Beatty Lumber Company, Alexander Lumber Co., Joliet Lumber & Fuel Company, Leach Brothers, Inc., Hacker-Sime Company, all Illinois corporations, Edward M. Newman, doing business as The New Lumber Company, E. Durbin Collins and Cathryn H. Collins, Co-Partners, doing business as Lyons Brothers Lumber & Fuel Company, P. C. Ryan, T. F. Ryan, M. L. Ryan, and A. L. Ryan, Co-Partners, doing business as Thomas F. Ryan Company, and Arnold R. Welsch and Walter W. Welsch, Co-Partners, doing business as Joliet Cash and Carry Lumber Company, pray that

a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on June 26, 1953, denying a petition to review and modify an order of the National Labor Relations Board entered June 30, 1952.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 714) is reported in 202 F. 2d 606 (C. A. 7, 1953). The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 570-583) are reported at 99 N. L. R. B., No. 146 (1952).

JURISDICTION.

The opinion of the Court of Appeals was entered February 10, 1953 (R. 714). A timely petition for rehearing, filed February 25, 1953 (R. 726), was denied on April 13, 1953 (R. 734). The judgment of the Court of Appeals was entered on June 26, 1953 (R. 739). The jurisdiction of this Court is invoked under Title 28, Section 1254, of the United States Code.

STATUTE INVOLVED.

This petition and the decision of the Court of Appeals involve the construction and application of Section 8(b)(4)(A) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. A. Sec. 141, *et seq.*), hereinafter called the "Act." This statutory provision reads:

"Sec. 8. • • •

"(b) It shall be an unfair labor practice for a labor organization or its agents—

• • • • •

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a

concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

> "(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *."

SUMMARY AND STATEMENT OF THE MATTERS INVOLVED.

Upon charges made by the petitioners (R. 31-50), the National Labor Relations Board, on October 5, 1948, filed a complaint against Glaziers' Union Local 27 of the Brotherhood of Painters, Decorators and Paper Hangers of America (herein called "Union") and two of its agents, charging that the Union and its agents violated Section 8(b)(4)(A) of the Act (R. 51-62). It charged both that the Union engaged in a strike and concerted refusal to perform glazing services and that it induced and encouraged the union glaziers to engage in a strike or concerted refusal to perform glazing services upon any construction job in Joliet, Illinois, where any preglazed sash was used, or upon any construction job being erected by a general contractor who would not agree to forego the use of preglazed sash on all jobs, all for the purpose of forcing contractors to cease using, and building material dealers to cease selling and dealing in preglazed sash in Joliet, Illinois, and for the purpose of forcing glazing contractors, general contractors and building material dealers and others to cease doing business with each other.

At about the same time the Board, pursuant to Section

10(l) of the Act, petitioned the United States District Court, Northern District of Illinois, for an injunction against the continuance of these secondary boycott practices pending final adjudication of the Board. The court, after extended hearings, on November 18, 1948, granted the injunction (R. 12, 13).[1]

Thereafter, hearings were held before the Board's Trial Examiner, at which all of the evidence produced in the District Court proceeding, except that relating to interstate commerce, was admitted by stipulation; and on July 18, 1949, the Trial Examiner filed his intermediate report finding that the Union and its agents had violated the Act and recommending that the Board order the Union to cease and desist its secondary boycott practices in Joliet (R. 78-109).

On June 26, 1950, the Board refused to exercise jurisdiction and dismissed the complaint (R. 117), but on petition for review, the United States Court of Appeals for the Seventh Circuit on January 7, 1952, remanded the case and directed that the Board exercise jurisdiction and decide the case on its merits[2] (R. 684).

Thereafter, on June 30, 1952, the Board entered its de-

1. The Board, in its Fourteenth Annual Report (1949), advised Congress of this case as follows (pp. 141-142):

> "In *Bott* v. *Glaziers' Union, Local 27* (Joliet Contractors), November 19, 1948 (D. C., No. Ill.), 23 L. R. R. M. 2181, the injunction was given broad scope to reach the union's manifest object generally to compel numerous employers, their suppliers and other persons to cease using a certain manufactured product. In view of the far-flung activities of the respondent union in the *Joliet Contractors* case, the court not only enjoined the union from continuing the specified conduct, but also directed it to notify all of its members of the court's decree and to inform them that all of the union's rules, laws, and instructions in conflict with the decree were suspended and that all members of the union were free to work on the boycotted jobs."

2. *Joliet Contractors Association, et al.*, v. *N. L. R. B.*, 193 F. 2d 833 (C. A. 7, 1952.)

cision and order dismissing all charges of violation except with respect to only one incident which it found violated the Act (R. 570-583, 78-109). The order was limited to union conduct such as was involved in the particular incident. Thereupon, the petitioners again obtained review by the Court of Appeals for the Seventh Circuit, which court affirmed the order of the Board (R. 714 to 724), and it is from this decision that the certiorari is requested.

As the Court of Appeals specifically found, there is no essential dispute regarding the facts,[3] which can be summarized as follows:

Petitioner, Joliet Contractors Association, represents nineteen general contractors engaged in the construction, remodeling and repair of commercial and residential buildings in Joliet and two glazing contractors who install glass in windows, doors and other parts of buildings in the Joliet area (generally under subcontract with the general contractors) (R. 41, 83, 325, 258-263). It is the glazing contractors who employ members of the Union (R. 258-263, 325-327).

The other petitioners are lumber and building material dealers who are engaged in purchasing, warehousing and selling building materials (including windows, doors and other parts of building structures) to contractors in the Joliet area (R. 325, 326).

The union membership consists of glaziers and the union jurisdiction covers the metropolitan area of Chicago and surrounding cities, including Joliet (R. 541). The Union is affiliated with the Building Trades Councils in Joliet and other cities within its jurisdiction (R. 330, 331). A purpose of such affiliations is that other trade unions will aid

3. Record references to statements and findings of fact are as follows: Complaint (R. 51 to 62); Intermediate Report (R. 78 to 109); Board's decision and order (R. 570 to 583); Court of Appeals (R. 684 to 699 and R. 714 to 718).

in enforcing its rules and regulations even to the extent of work stoppages by other crafts (R. 538, 336, 442).

The glazing of windows, doors and other parts of a building is done either at the job site by local glaziers or at the factory where the product is manufactured. When the glazing is done at the factory, the product is known as a "preglazed" or "mill-glazed" product (R. 261, 339, 342). Windows, doors or other products sold without glass are generally known as "open sash" and then the glazing is done on the job after the product has been installed (R. 261-263, 325-327).

Throughout the period covered by the complaint, the Union had a program designed to prohibit the use of all preglazed sash in Joliet. The Court of Appeals described this plan as follows (R. 716):

> "* * * the record discloses beyond doubt that the objective of the Union and its agents was to prohibit the use of preglazed sash in the Joliet area and that a carefully devised plan was formulated for the purpose of accomplishing that result. The Union's bylaws and working rules, its announcement of unfair lists of contractors and material dealers who refused to comply with the Union requirement, and its refusal to furnish glaziers to those on the unfair lists, were all elements of a grandiose plan to accomplish the Union's objective."

The Union stipulated that "the general contractors have had to elect to use preglazed sash and forego the use of union glaziers, or to use the union glaziers and forego the use of preglazed sash" (R. 326).

The union bylaws and working rules prohibited members of the Union from working on any job where preglazed sash was used or on any job being constructed by any contractor who used preglazed sash on any job (R. 341, 540). Article XVI of the By-Laws provided "* * *

All sash and glazing work must be done on each respective job site or building" (R. 341). And a member violating the rule was subject to disciplinary action, either a fine or dismissal from the Union (R. 340). The president of the Union candidly testified that there is no preglazed sash used on any union job "because we object to it" and "preglazed sash never enters into a job when our men are there" because we have a rule against the use of preglazed sash (R. 338, 339). A business agent of the Union testified that if they found sash on a job which did not bear the union label, it was classed as an unfair job, and that every day members of the Union leave jobs and refuse to work because the job does not conform to the union rules either because the sash was glazed at a mill or glazed on the job by someone else (R. 371-375). These same union rules against preglazed sash have been in effect in the city of Chicago for many years with the result that preglazed sash is banned in Chicago (R. 85, 86, 429, 431, 525).

The bylaws also provided that glazing contractors could employ only union glaziers, and all glazing contractors in the Union's jurisdiction either signed a closed shop contract with the Union or adhered to closed shop practices (R. 85, 86). In conjunction with the closed shop the Union operated a hiring hall by which it controlled the work assignments of glaziers.[4] Some glaziers were regularly assigned to particular glazing contractors; and if a contractor required additional glaziers, he would call the union office in Chicago and additional glaziers would be assigned by the Union from a pool of glaziers. During the period involved in the complaint, there were four to five glaziers regularly employed by the glazing contractors in Joliet, and each week there were normally several additional

4. The Union stipulated as to the mechanics of this system and the means by which the Union rotated workers under a share-the-work plan (R. 327, 328, 518).

glaziers assigned to the Joliet area from the Chicago pool (R. 259, 260, 303, 429, 430). Intervals between work for different contractors were considered layoffs, and repetition of assignment of employees was anticipated and the names of glaziers assigned to glazing contractors from the pool were carried on the contractors' records even though they also worked for other contractors (R. 327, 587, 588).

Beginning early in 1947 and continuing until the District Court injunction proceeding in September, 1948, the Union demanded that the general contractors in Joliet stop using preglazed sash and that they sign an agreement to that effect (R. 86-88).

At a meeting between the contractors' association and the Joliet Building Trades Council in March, 1947, the contractors were told that the Union refused to do glazing work on the jobs of any contractor who used preglazed sash in the Joliet area and the Union was "definitely going to eliminate it" (R. 427-430). Again at a meeting of representatives of the contractors' association and the Union in Chicago in June, 1947, the contractors were told that the Union refused to perform glazing work for any contractor using preglazed sash. The contractors were told at this meeting that they would "definitely have to cease using preglazed or mill-glazed sash on windows" (R. 379-382, 428-431). Again in November, 1947, the association representatives at a meeting with the Union were told, "I cannot let you have men unless you agree to go along with the contract" (R. 277, 431-433). At another meeting February, 1948, the Union demanded that the contractors stop using preglazed sash, saying, "We will not permit our glaziers to work on any jobs where preglazed sash is in use" (R. 434, 435, 439-441).

Throughout this period there was correspondence between the association and the Union in which the Union

continued to demand a written agreement from the contractors not to use preglazed sash under penalty of receiving no glazing work in the Joliet area (R. 419-423, 533, 535, 538). In addition, the Union told numerous individual general contractors that it refused to perform glazing services on their jobs because they had not capitulated to the Union's boycott against preglazed sash—some of these are mentioned hereafter. The general contractors, represented by the Joliet Contractors Association, refused to sign such an agreement.

However, as time went on, some general contractors were forced to discontinue the use of preglazed sash. Beginning in January, 1948, the Union circulated an "unfair" list of contractors, being those who refused to stop using preglazed sash on any of their jobs, and the Union refused to work on the jobs of such contractors. Thereafter, names of general contractors were added to, or removed from, the list as conditions changed. These "unfair" lists were sent to the two glazing contractors in Joliet, the persons for whom the union glaziers worked (R. 278-279, 295-296, 403, 404, 410-447).

Throughout this period there were numerous specific instances where union glaziers left jobs or refused to work on jobs, or the Union refused to permit work on jobs, either because the job had some preglazed material on it or the contractor was using preglazed materials elsewhere (R. 86-102).

In January, 1947, Contractor Paul G. O'Neil was constructing 50 G. I. homes involving an investment of $300,000. Part of these houses had wood preglazed sash installed, and others had open metal sash which required glazing on the job. When union glaziers saw the preglazed sash, they stopped work and reported to the Union. They were directed not to continue work until all preglazed sash

was removed and new open sash installed on the whole project. Contractor O'Neil was thereby forced to replace all preglazed sash with open sash, after which union glaziers resumed work and completed glazing on the entire project (R. 263-266, 322, 323).

In November, 1947, union glaziers refused to install plate glass on the Remiens Laboratory job, because during past years the owner had replaced some other small glass panes which had been broken out by children. The Union required all such other glass to be removed and reinstalled by union glaziers. Only then was the plate glass job done (R. 271-273).

In November, 1947, the Union refused to permit glaziers to glaze a store front on the Reliable Poultry Company job, because the general contractor, Magnus T. Strandberg, had been using preglazed sash and would not stop using it (R. 268, 275, 276).

At a meeting in November, 1947, at the Building Trades Council in Joliet, the Union again announced to the contractors that glaziers refused to work on the Strandberg job, because Strandberg had been using preglazed windows (R. 276, 277, 431-433).

In February, 1948, the Union permitted glaziers to do a fire repair glazing job for the Joliet Mattress Company only after it was arranged for the work to be done by the glazing contractor for the owner, one Sohn, and not for general contractor Matt Gregory who was not then on the "fair" list (R. 279, 280, 446).

Also, in February, 1948, the Union did not permit glaziers to set glass on a fire repair job for owner John Costa, because the general contractor on the job, Walter Harshbarger, had not agreed to use open sash. Then the owner engaged another general contractor, Claude Girard, and the use of glaziers was permitted by the Union only

after Girard agreed to use open sash (R. 281-283, 453-456).

In March, 1948, the Union did not permit its members to perform glazing work on a nine- or ten-house project being constructed by general contractor Gregory. After a month or two delay, Gregory agreed to go along and "decided" to remove the glass on the preglazed windows then installed and have them reglazed (R. 446-448).

In April, 1948, general contractor Stonitsch was building a house for a war veteran at 719 Cornelia Street. The Union refused to do glazing work on this job because Stonitsch was using preglazed materials (R. 451-453, 291, 292).

In April, 1948, general contractor Bockholdt was rebuilding a filling station which required the installation of nine large double plate windows. Four glaziers sent to the job found two new preglazed doors that had been installed a day or two before. They stopped the performance of their glazing job and went to the preglazed doors, removed the glass, scraped the back putty, and put the glass back in the doors. Only after the substantial delay entailed in doing this work did the glaziers return and perform their assigned job (R. 449-451, 471, 472, 286).

In April, 1948, glaziers were permitted to perform work on the Cherry Hill residence job of general contractor Strandberg only after he agreed to go along on the Union's ban against preglazed sash (R. 287-290, 405, 469, 470).

In May, 1948, the Union refused to install 11 large plate glass windows on a large food market being remodeled for the Honiotes Brothers, because general contractor Roy Ice was on the "unfair" list. Glazing subcontractor Hacker then sold the glass to general contractor Ice who installed it himself. Upon learning this the Union caused Leonard Ahrens, Hacker's only full time glazier employee

to leave Hacker's employment and assigned Ahrens to full time employment with Hacker's Joliet competitor, the Porter Glass Company (R. 297-301, 435-439, 407-410, 474-477, 502, 511).

In May, 1948, the Union refused to permit glaziers to work on the Brewster Printing Company job, because general contractor Ugland "had not agreed to use open sash as yet." The glazing work was done only after contractor Ugland capitulated to the Union's ban against preglazed sash (R. 293-294, 443-445).

In June, 1948, general contractor Mazzucco was engaged in remodeling two store fronts for the Grant Hardware Company. He gave glazing subcontractor Hacker an order to install 10 glass plates. The job involved only the ground floor of the building. When the glaziers arrived on the scene they observed 14 preglazed windows in apartments on the second floor which had been installed at least two years before. They stopped work and called the Chicago office of the Union. The agent told them, "You are on the job, you know the condition of the job and you know the union rules. Do what is right" (R. 307). The glaziers then required that all 14 preglazed windows be removed, that 14 new open sash be purchased and installed on the second floor by carpenters. The glaziers then installed the new glass in this open sash. Only after all this and the substantial delay entailed did the glaziers resume work on their assignment which was the installation of glass plates on the ground floor store front (R. 304-312, 457-462).

In July, 1948, general contractor Berti was refused glaziers for the installation of front glass plates on a store building then being remodeled for one Lezenbroom. After several days he finally told the Union he would "go along," whereupon the glazing job was done (R. 464-466).

In July, 1948, glazing subcontractor Porter Glass Company took a contract from general contractor Kaiser-

Ducett to do all the exterior glazing on a department store being built for the Sears Roebuck company. The job involved the installation of large plate glass windows. While union glazier Ahrens was doing preliminary glazing work he saw that interior showcases and cabinets were coming in preglazed. He thereupon stopped work. The Union did not permit glaziers to carry out the exterior glazing contract until they were permitted to remove glass from interior showcases and fixtures and reglaze same (R. 480-487, 497-500).

In most of the foregoing situations of union refusals to work, the Union refused to permit glaziers to perform work on jobs of "unfair" contractors who had not capitulated to the Union's boycott ban. These refusals applied to the glaziers steadily employed by Joliet glazing subcontractors, as well as to the additional glaziers in the Chicago pool who in normal course would have worked on the larger jobs. In the Bockholdt filling station job and the Grant Hardware job, glaziers stopped work after they had started work on these jobs. In the Roy Ice incident, one employee was caused to leave the employment of glazing subcontractor Hacker. In the Sears Roebuck incident, although the glazing job required several glaziers, only one glazier had reported for work at the time the Union refused to permit work until the boycott condition was corrected (R. 86-102).

In its decision of June 30, 1952, the Board concluded that, with the single exception of the Grant Hardware incident, the Union's entire course of conduct was legal under the Act and the Board dismissed all other charges of the complaint. It was held that the Union violated the Act in the Grant Hardware situation, because agent Meyers called the glaziers' attention to the bylaws and thereby induced them to stop work for the proscribed objective of causing Hacker to stop doing business with contractor Mazzucco (R. 570-578).

THE DECISION BELOW.

The court below held that the Union had a "grandiose plan" to prevent the sale and use of preglazed sash by all building material dealers and contractors in Joliet. It held that the elements of the plan consisted of the Union's bylaws and working rules forbidding glaziers to work on jobs where any preglazed sash was used or where the general contractor used preglazed sash, the lists of "unfair" contractors who refused to agree not to use preglazed sash, and refusals to permit glaziers to work on "unfair" jobs. It found that this constituted an illegal objective under the Act (R. 721).

It also held that the bylaws and working rules themselves, without more, constituted inducing or encouraging employees to strike or concertedly refuse to perform glazing services (R. 722, 723).

But it held that the means used to accomplish the illegal object were not those proscribed by the Act.

It held both (1) that the *Union was not engaged in a strike or concerted refusal* to perform glazing services, and (2), that the *Union was not engaged in inducing or encouraging* the glaziers to strike or concertedly refuse to perform glazing services, except in two isolated instances referred to later.

It held that the Union and its agents had not engaged in a strike or concerted refusal to perform glazing services, because it thought that the words of the Act "in the course of their employment" required it to judge the case by the action of glaziers actually at work on a particular construction job and not by union action. Holding that Congress had no constitutional right to proscribe the refusal to accept employment, it went on to hold that neither the refusal of the Union to permit glaziers regularly work-

ing for glazing contractors in Joliet to work on "unfair" jobs nor the refusals of the Union to assign additional glaziers to work on "unfair" jobs constituted a strike or concerted refusal.

It held that the union inducement and encouragement of the glaziers to strike or concertedly refuse to perform glazing services on "unfair" jobs or on jobs being erected by "unfair" contractors did not offend the Act because it found no strike or concerted refusal of the glaziers to perform services. Otherwise stated, it held that the gist of this offense was not inducing or encouraging a strike or concerted refusal to perform services but the actual occurrence of a strike or concerted refusal.

Based on this concept of the law and the evidence, it found that the Act had been violated only with respect to two isolated incidents (1) the Grant incident where the union agent called the bylaws to the attention of glaziers working on the job and they quit work, and (2), the Bockholdt incident where glaziers working on that job quit work, and the court held that the bylaws and working rules of themselves induced and encouraged the quitting.

QUESTIONS PRESENTED.

1. Was the court correct in holding that the Union and its agents did not engage in a strike or concerted refusal to perform services for an admittedly illegal object in violation of the Act?

Is the offense to be judged by the conduct of the Union or its agents, or do the words of the Act "in the course of their employment" require that the offense be judged by the action taken by union glaziers while working on particular jobs?

Do the words in the Act "in the course of their employment" render of no significance here the refusals of the

Union to permit glaziers regularly working for, and continuously employed by, glazing contractors in Joliet, to work on "unfair" jobs and the refusals of the Union to assign additional glaziers to glazing contractors in Joliet for work on "unfair" jobs?

Are not the union bylaws and working rules supplemented by the "unfair" list of contractors ample proof that the *Union and its agents* engaged in a concerted refusal to perform glazing services which were designed to and did affect the glaziers in the course of their employment?

2. Where, as here, the Union is found to have induced and encouraged its members concertedly to refuse to perform glazing services for the object of compelling material dealers and contractors in Joliet to cease handling and using preglazed sash, is it necessary under the Act that the glaziers actually strike or concertedly refuse to work or perform services on particular jobs? Is not the gist of the offense the Union's inducement or encouragement of the glaziers to strike and concertedly refuse to work whether or not the inducement or encouragement reaches fruition?

Did not the Union induce and encourage the union glaziers to strike or concertedly refuse to perform glazing services "in the course of their employment"?

3. Is the Union's boycott of preglazed sash from the entire Joliet area within the scope and purview of the Act?

REASONS FOR GRANTING THE WRIT.

1. The holding of the court below that the Union and its agents did not engage in a strike or concerted refusal to perform services which affected the glaziers "in the course of their employment" is in conflict with decisions of this court.

The Union took all the steps possible to engage in a strike or concerted refusal to work. Its bylaws forbade its members to work on jobs where preglazed sash was used or on jobs being constructed by contractors who refused to forego the use of preglazed sash, under penalty of fine or losing their union cards. It told the general contractors that they would get no glazing work on any jobs if they did not agree to forego the use of preglazed sash. It maintained and circulated to the glazing contractors a list of "unfair" contractors—those who would not agree. It refused to permit Joliet glaziers to work on "unfair" jobs or to assign Chicago glaziers for work on "unfair" jobs. The Union could have done no more to engage in a strike or concerted refusal to perform glazing services. Work on boycotted jobs was completely prohibited and prevented. And the union action was designed to, and did, affect the union glaziers "in the course of their employment."

The court below held that the offense did not depend upon the conduct of the Union and its agents but upon the conduct of employees (here the union glaziers). It reached this conclusion because of the words of the Act "in the course of their employment." Having concluded that employee conduct was the gist of the offense, it further concluded that employees could not engage in a strike or concerted refusal to work unless they were actually at work on a particular job. The view of the court below is contained in the following sentences from the opinion:

> "We agree with the view *that employees cannot be on a strike or engaged in a refusal* 'in the course of their employment' prior to the establishment of an employer-employee relationship. If Congress had intended to proscribe the refusal to accept employment, either individually or in concert, it no doubt would have employed language appropriate to accomplish such

purpose. We suspect that Congress deliberately refrained from doing so in order to escape serious constitutional challenge." (Emphasis added.)

In other words, the court holds that it is the employees that offend, not the Union. In so concluding, the court completely overlooks the fact that the Act provides that the unfair labor practice is against a "labor organization and its agents" and that Congress has constitutional power to limit union conduct whereas individual conduct is protected by the Thirteenth Amendment.[5]

This holding is in conflict with the construction of the Act in *Labor Board* v. *Denver Bldg. & Const. Tr. Coun.*, 341 U. S. 675 (1951), and with the *Carpenters Union* v. *Labor Board*, 341 U. S. 707 (1951).

In the *Denver* case the Building Trades Council had a bylaw which provided that the council stood for closed shop conditions on all jobs in Denver, that the council had the power to declare a job unfair and that any craftsman refusing to leave a job declared to be unfair should be subject to fine. The Doose and Lintner job was declared unfair and was picketed because the electrical work had been subcontracted to a firm using nonunion men and an object of the council's action was to force Doose and Lintner to terminate the electrical subcontract. This court said that declaring the job to be "unfair" and notifying the various unions was a signal to employees to leave the job or remain away unless otherwise notified. It was this action that created the violation—at that point the *Union Trades Council had engaged in a strike or concerted refusal* to work.

5. *National Labor Relations Board* v. *Local 74, etc.*, 181 F. 2d 126, 132 (C. A. 6, 1950; aff'd. 341 U. S. 707), in which this very question was raised. Cf. *Phelps-Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 187 (1941), dealing with the legality of conduct discriminating against a person *seeking* employment.

True, some employees left the job or refused to work on it, but it was not the individual action of particular workmen that violated the Act, but rather the union action that constituted the offense. It is significant that the trades council was an organization made up of various building trade unions and did not even have any employee members. Yet it was held to have engaged in a strike or concerted refusal to perform services in violation of the Act. The only action it could take was to declare a strike and leave it to the individual workman to obey or not.

The *Denver* case is, in many respects, a parallel to the instant case. Here, the Union had bylaws and working rules that prevented any member from working on jobs where there was preglazed sash. They were applicable at all times to every union glazier regardless of any signal. Members were subject to fine or expulsion if they disobeyed. But in addition there was an "unfair" list of contractors who refused to stop using preglazed sash. Union pronouncements against work on the boycotted jobs had continuing force and effect. And beyond that, the Union consistently refused to permit glaziers to work on "unfair" jobs and refused to assign glaziers for work on such jobs. There is no essential difference in the two cases. If anything, the case here is one of even stronger illegal union action.

In the *Carpenters* case the union had declared Watson's store to be "unfair" because it employed nonunion labor. Parker, a contractor, was renovating a home on which the owner had contracted with Watson for the furnishing and installation of floor coverings. Watson began his installation with nonunion men after which a carpenters' union agent told four union carpenters working there that they could not continue to work with Watson's nonunion men. The union men finished their day's work but did not return the next day. Watson's men then returned and com-

pleted their work, and later the unfinished carpentry work was done by two of the four men who had been on the job but who returned without the knowledge or consent of the union.

This court held that the union had engaged in a strike and concerted refusal to perform services in violation of the Act in spite of the fact that the job was finished by two union carpenters who refused to follow the union's edict and in spite of the fact that the union had declared the strike before the Act had become effective, and there were no men at work when the Act became effective. The holding of this court was not based upon the action of particular members of the union but upon the union conduct as such.

This court particularly pointed out (p. 713) that the carpenters as individual employees were not charged with an unfair labor practice, but the charge was confined to the actions of the labor organization and its agent in engaging in and ordering and continuing a strike for a proscribed objective after Congress had made such conduct an unfair labor practice.

The *Denver* and *Carpenters* cases hold that union conduct is the gist of the offense and not the conduct of glaziers working on particular construction jobs. Looking at the union conduct, the lower court should have held that the bylaws and working rules of the Union of themselves constituted a concerted refusal on the part of the Union to perform glazing services for the illegal object of eliminating the use of preglazed sash in Joliet. And certainly, when supplemented by the pronouncements to general contractors that the glaziers refused to work on jobs of any contractors using preglazed sash, and the circulation of an "unfair" list of contractors, the concerted refusal on the part of the Union becomes more than clear.

Thus, the words of the Act "in the course of their employment" do not change the character of the offense as one against the conduct of unions and their agents. Those words mean that the conduct of the Union and its agents must relate to and be designed to affect employees in the course of their employment.

Here, the union boycott program not only related to and was designed to affect, and actually did affect, the union glaziers "in the course of their employment." On numerous occasions, union glaziers regularly working for glazing contractors in Joliet were prevented from installing glass on "unfair" jobs or working on jobs *then being constructed* by "unfair" contractors. But for the union program, union glaziers would have performed glazing services on all these jobs in the regular course of their employment by the glazing contractors. The court failed to recognize the distinction between "course of employment" and particular job assignments during the course of employment. As to these glaziers regularly employed by Joliet glazing contractors, there was a continuing employment relationship (under any theory) *during the course of which employment* each glazing contractor's employees moved from job to job as work was required. Refusals to work on specific boycotted jobs were in the course of employment whether the workers had started or had not yet started work on a specific job. Such were not refusals to *accept employment* as the court seems to think—such were refusals *to perform services in a continuing* employment relationship. Of course, on several jobs, the union glaziers quit after having started work on "unfair" jobs. And the Union refused to assign additional glaziers to Joliet glazing contractors for work on such jobs—work which the glaziers would have performed in the regular course of employment had it not been for the union boycott program. In a hiring hall situation where a union rotates an identified pool of glaziers (whose regular

employment is glazing) among an identified group of glazing contractors, the union's refusal to permit work is in the course of their employment within the meaning of the Act.

2. The holding of the court below that there must be a strike or concerted refusal to work before it becomes illegal to induce or encourage the union glaziers to do so, is in direct conflict with the accepted view that the offense is inducing or encouraging the employees to strike or concertedly refuse to work, not the strike or concerted refusal.

As this court pointed out in *Electrical Workers* v. *Labor Board*, 341 U. S. 694, 700 (1951), the offense of inducing or encouraging a strike or concerted refusal is a different offense than engaging in a strike or concerted refusal.

The holding of the lower court would make the gist of the two offenses the same; namely, a strike or concerted refusal.

This holding is in conflict with *N. L. R. B.* v. *Denver Bldg. & Const. Tr. Coun.*, 193 F. 2d 421, where the Tenth Circuit specifically held that the gist of such a violation is the inducing or encouraging employees to strike in the course of their employment and not the success they have in obtaining the objective. The Court said on page 424:

> "All these decisions make it clear that it is not necessary to a violation of this section that labor organizations engage in a secondary strike or persuade other employees to do so. It is sufficient if they induce or encourage concerted conduct by the employees of a neutral employer to engage in such a strike, although they may fail in their efforts."

The court was referring to the four cases decided by this court in 341 U. S. on secondary boycott questions. In that case representatives of the Trade Council approached two

electricians installing equipment manufactured by Grauman, a manufacturer of soda fountains and store equipment. Grauman was considered unfair and it was suggested that they stop work. Neither of them did. The court held that on these facts the Board was correct in finding that the council induced or encouraged concerted conduct in violation of the Act even though nobody left his work.

The holding is also in conflict with *Electrical Workers* v. *Labor Board,* 341 U. S. 694 (1951), where this court found that the picketing of a job for the purpose of forcing a contractor to employ union electricians constituted an illegal inducement and encouragement to strike in the course of employment. True, in that case the carpenters walked off the job, but this court did not rely upon the fact that the carpenters quit work but rather that the Act had been violated when, by peaceful picketing, the Electrical Union sought to induce and encourage the carpenters to quit work. This court, at page 703, commented on the breadth of the words "induce or encourage," contrasting them with phrases used in other parts of Section 8(b), holding that the words "induce or encourage" go on beyond such words as "cause or attempt to cause." Certainly, an attempt does not require consummation of the thing attempted.

The offense of inducing and encouraging can be compared with Section 8(b)(1) of the Act, which makes it illegal for an employer to interfere with, coerce, or restrain employees in the exercise of their rights under the Act. It has been consistently held that an employer is guilty of interfering with or coercing employees even though the interference or coercion fails of its desired effect. *Elastic Stop Nut Corp.* v. *National Labor Relations Board,* 142 F. 2d 371, 377 (C. A. 8, 1944); *Western Cartridge Co.* v. *National*

Labor Relations Board, 134 F. 2d 240, 244 (C. A. 7, 1943), cert. den. 320 U. S. 746; *National Labor Relations Board* v. *John Engelhorn & Sons,* 134 F. 2d 553, 556 (C. A. 3, 1943), and *National Labor Relations Board* v. *Winona Textile Mills,* 160 F. 2d 201, 205, 206 (C. A. 8, 1947). The same is true of union coercion or restraint under Section 8(b)(1). *Progressive Mine Workers* v. *National Labor Relations Board,* 187 F. 2d 298, 301 (C. A. 7, 1951). The lower court's decision conflicts in principle with these cases.

Having held that the Union's whole program was for the proscribed objective of stopping the use of preglazed sash, the court below then held unequivocally that the Union's bylaws and working rules continuously operated as the strongest kind of inducement and encouragement of glaziers to refuse work for such objective.

> "These by-laws constitute more than an inducement or encouragement to its members. They are a command both to refuse employment where preglazed sash is used and to cease work when its use is discovered, and a Union member is subject to penalty if he neglects or refuses to comply with this Union edict. * * * Certainly the members know what the by-laws require and they have no choice but to refuse to work when discovery is made that preglazed sash is being used" (R. 722).

Admittedly, these rules constituted a continuous command to all glaziers, including those regularly employed in Joliet, as well as those in the hiring hall pool.

This constituted both elements of the offense (1) inducement and encouragement, and (2), a proscribed objective.

3. The court's failure to find that the union conduct amounted both to a strike and a concerted refusal on the part of the Union, as well as inducing and encouraging employees to strike or concertedly refuse to work, stems from its failure to recognize that the language of the Act

is consistent with a congressional purpose to eliminate area product boycotts which are so prevalent in the construction field. This was not a boycott of a number of separate construction jobs where preglazed sash was being used. It was a boycott of all preglazed sash in the entire Joliet area. The evidence of the scope of the boycott is contained in the bylaws and working rules which applied to all glaziers working in that area, the pronouncements to the representatives of the Joliet Contractors Association and to individual contractors, the list of "unfair" contractors in Joliet who would not agree to give up the use of preglazed sash and, in addition, the numerous refusals by the Union to permit glaziers to perform services on "unfair" jobs and the union refusal to assign additional glaziers to work on "unfair" jobs.[6]

The fallacy of the lower court's approach to this case is illustrated by its reference to the *Ice* and *Sears Roebuck* incidents and its holding that in those incidents only one employee was involved, and under the principle of the *Rice Milling* case (341 U. S. 665), this could not amount to concerted refusal. It ignores the fact that here the Union's inducement and encouragement was directed at all glaziers working in the Joliet area, whereas in *Rice Milling*, it was directed at a single employee on a single job.

By treating this case as though there were a boycott of particular construction jobs only, the court below has virtually ruled that there cannot be any such thing as an illegal boycott of a product from an entire area—at most there could be a series of separate boycotts.

But this type of boycott (which has not yet been before

6. To consider such a comprehensive boycott only by appraising union conduct on individual jobs is like dismembering the evidence in a conspiracy case. In such a case this court said:

"• • • It hardly needs statement that the character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." (*U. S.* v. *Patten*, 226 U. S. 525, 544 (1913).)

this court) was one of the principal targets of the Act. It was referred to frequently in the debates and reports on the legislation.[7] It was the type of boycott that was involved in *Allen Bradley Co.* v. *Union*, 325 U. S. 797 (1945), where the New York Electrical Workers' Union refused to install equipment in New York City unless the contractor agreed not to use any electrical equipment manufactured outside New York. The result was that no electrical equipment manufactured outside New York could be used in New York. The *Bradley* case was specifically mentioned in the debates and reports as involving a type of secondary boycott to be eliminated.

We have that kind of boycott here, and the court below should have construed the Act consistently with legislative purpose and intent.

4. The questions presented are of widespread importance to employers and unions in the construction and building material industries and to the public generally.

It is a fair conclusion that, if the lower court decision is permitted to stand, the secondary boycott provisions of the Act in the construction industry will be largely nullified.[8]

In its immediate application, the effect of the decision

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7. See Extracts from Legislative History of the Labor Management Relations Act, 1947, which are printed in the Record herein at pages 589, 591, 595, 597, 600, 602, 608.

8. Regarding the decision of the court below, a recent Law Review article states (21 The George Washington Law Review, pp. 547, 566):

> "One case involving the issue has already been decided by the Seventh Circuit. The glaziers' union in Joliet, Illinois, was trying to prevent contractors from using preglazed sash. In effect, it was a product boycott. Among other things, the union ordered its members not to work for contractors who used such sash. The court felt that the proscription of the Act did not reach such conduct even though a type of secondary boycott was involved.
>
> "If the court's interpretation is correct, Congressional action is required. Otherwise, the secondary boycott prohibition can be tossed into the ash can as far as the construction industry is concerned."

is that the Glaziers' Union can perpetuate its boycott against preglazed building materials and continue its stranglehold on the construction industry in this area. If permitted to stand, it cannot but encourage a continuation and extension of such product boycotts in construction areas throughout the country.[9]

Under the court's decision a union may adopt bylaws and working rules that prohibit its members from working on any job where a boycotted product is used or for any contractor who uses such product. Strong trade unions can thus accomplish boycotts in major construction areas without the necessity of causing strikes on particular jobs.

Under the court's narrow construction of "course of employment" a union, through its control of work assignments, can effectively accomplish boycotts by the simple device of refusing to permit its members to go to work on boycotted jobs.

A union may accomplish boycotts by blacklisting contractors and jobs and refusing to work on such jobs.

This court's comment regarding peaceful picketing in the *Electrical Workers* case is equally applicable to the many union activities condoned by the court in the present case. To hold such boycott devices legal "would be to impute to Congress an incongruous intent to permit, through indirection, the accomplishment of an objective

9. The Board itself has explained the serious consequences of an extension of secondary boycotts in the construction industry. In its brief to this Court in the *Carpenters* case, it was stated:

"In view of Congress' observation that potentially the secondary boycott can create 'a chain reaction that will tie up the entire United States in a series of sympathetic strikes' (93 Cong. Rec. 4198, Leg. Hist., p. 1107), it is idle to argue that Congress was oblivious to and unconcerned with the consequences of secondary boycotts in the building construction industry upon the national economy." Board's Brief, p. 28, No. 85, U. S. Sup. Ct., October Term, 1950 (341 U. S. 707).

which it forbade to be accomplished directly" (341 U. S. 694, 703-4).

The confusion which exists as a result of the decision of the court below was explained by the court itself when it said:

> "As we study this record we are increasingly impressed with the numerous apparent incongruities which abound in the reasoning of the Board, and which we must admit this opinion does little to eliminate. For instance, if two or more glaziers refuse to accept employment because of the use of preglazed sash there is no violation as they have not concertedly refused to work in the course of their employment. However, if they discover the use of preglazed sash after they are on the job and then refuse to work, it is a violation because they have done so in the course of their employment. At the same time, if there is only one glazier on each of several jobs and they each refuse to work, it is not a violation because their refusal is not concerted. These incongruities and others which could be mentioned are unavoidable because of the plain unambiguous language employed by Congress in enumerating the elements required to constitute a violation."

But, in conflict with the decisions of this court and of other United States Courts of Appeal, the court below plainly misconstrued and misapplied the Act.

It is respectfully requested that this Petition for Writ of Certiorari be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 173

JOLIET CONTRACTORS ASSOCIATION ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 714-724) is reported at 202 F. 2d 606. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 570-582, 78-109) are reported at 99 NLRB 1391 and 90 NLRB 542.

JURISDICTION

The judgment of the court below (R. 739-740) was entered on June 26, 1953. The petition for a

writ of certiorari was filed on July 11, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

The by-laws of the Glaziers' Union provide in effect that its members shall not work on jobs where either the building project contains sash which has been preglazed or the general contractor is one who customarily uses such sash. In consequence of the by-laws, the Union refused to assign members to glazing subcontractors for work on these jobs, and the members themselves would be induced to decline such work opportunities. The question presented is whether the Union thereby violated Section 8 (b) (4) (A) of the Act, which forbids a labor organization or its agents "to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment . . . to perform any services, where an object thereof is . . . forcing . . . any employer or other person to cease using . . . the products of any other producer. . . ." More specifically, the question is whether Section 8 (b) (4) (A) proscribes union compulsion exerted before an employment relation has been created.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C.

Supp. V, Sec. 141, *et seq.*), are set forth in the Appendix, *infra,* pp. 20-22.

STATEMENT

A. The Board's decision

1. *The background facts*

When glazing was required to be done on a building project,[1] the general contractors in the Joliet, Illinois, area customarily sublet this work to either of the two glazing subcontractors doing business in Joliet (R. 92; 52-53, 317-318, 325, 534, 585). These subcontractors—George Hacker of the Joliet Paint and Glass Company and Maurice Adler of the Porter Glass Company—employed only glaziers who were members of the Glaziers' Union, Local No. 27 of the Brotherhood of Painters, Decorators, and Paper Hangers of America, herein called the Union (R. 93; 258, 473).

The Union controlled the work assignments of its members through its office in Chicago, with an object of giving every member "over the yearly period . . . the same hours of employment" (R. 328). Some members were allocated to the shops of certain glazing subcontractors, subject to reassignment when that contractor had insufficient work or the Union so desired (R. 328, 376, 93-94);[2] the

[1] The glazing of windows, doors and other parts of a building is done either at the job site or at the factory where the product is manufactured. The latter is known as "preglazed" or "mill-glazed" material, whereas products sold without glass are referred to as "open sash." (R. 85; 145-146, 261.)

[2] At the outset of the events herein, there were four Union glaziers who resided in Joliet; the Union had assigned one of these to subcontractor Hacker's shop and two to Adler's shop (R. 258-259, 303, 473-475).

remaining Union glaziers were used to fill the subcontractors' additional needs (R. 327-328). Member glaziers generally worked for more than one employer during the course of a year; these employers were unrelated, and there was no continuity of work or assurance of renewal with any particular employer at any definite period or time (R. 574, 327-328).[3] The glaziers were free to accept or reject the Union's assignment of them to a particular contractor, and were paid by a particular contractor only while working on that contractor's jobs (R. 258, 327-328, 376, 523, 679-680, 682).

The terms and conditions under which Union glaziers would work for their immediate employer, the glazing contractor, were defined in a series of by-laws and working rules, promulgated by the Union long before the 1947 amendments to the Act (R. 85; 337, 340, 343, 676). The Union sought to secure employer assent to these by-laws and rules by incorporating them as provisions of its Standard Working Agreement with the glazing contractor (R. 86; 332, 333, 340, 343, 676). The basic purpose of the Union's rules was to maximize the work available for its members (R. 94-95, 574; 373-374).

Thus, Article VI of the Agreement provided that glazing contractors should employ "none but members of Glaziers' Union No. 27" (R. 540); Article XVII of the by-laws prohibited a Union member employed by one glazing contractor from

[3] Thus, subcontractor Adler had given employment over a period of time to fifty different glaziers, and, in an eight-month period, Hacker had employed thirty-six different glaziers (R. 473, 546-549, 587-588).

working for another contractor "after regular working hours" (R. 332); Article XIV of the Agreement specified the minimum number of glaziers to be used by glazing contractors for different types of work (R. 542-543); and Article VII of the Agreement prohibited a glazing contractor from subletting any glazing contract, providing further that Union members were to comprise at least 25 percent of the work force used by the contractor to perform contracts outside of the Union's specified jurisdiction (R. 540).

Serving a similar function was the "preglazed sash" rule. Article VII of the Standard Agreement (R. 540), incorporating the rule of Article XVI of the by-laws, provided that (R. 85; 341):

> No member of this Union will be allowed to glaze any sash for any building in the course of construction or repair within the jurisdiction of [the Union], in the warehouse of any glazing contractor. All sash and glazing work must be done on each respective job site or building.

The effect of this prohibition was that glazing subcontractors who signed the Standard Agreement neither used nor handled preglazed material, nor would Union members work on jobs using such material (R. 336-339, 371-375).

The use of preglazed material was a matter of direct economic concern to both the Union glaziers and their immediate employer, the glazing subcontractor. Its use greatly reduced the employment opportunities open to Union glaziers, for

carpenters were employed to install preglazed doors and windows (R. 261, 423-424, 449, 450, 522, 676). And, since the glazing subcontractor did not employ carpenters (R. 261, 479), his profits were diminished every time glaziers were displaced (R. 677-678).

2. *The Union's efforts to secure compliance with the preglazed sash rule in the Joliet area*

Employers of Union glaziers in Chicago had been adhering to the Union's working rules, and had manifested their consent by signing the Union's form agreement. The work opportunities of Union glaziers, however, were jeopardized by the absence of any formal agreement in the Joliet area. (R. 86; 332-333, 427.) Accordingly, in March 1947, the Union met with petitioner Association, representing the general contractors and certain subcontractors in Joliet,[4] for the purpose of getting the contractors to sign the Chicago-type contract, with its prohibition on preglazed material. Union Vice President Max Glass advised that if the glazing contractors "were going to employ union glaziers [on their] jobs [they] would have to stop the use of preglazed sash" (R. 86; 330, 343, 427-428). No agreement was reached at this time (R. 86; 428).

Between June 1947 and February 1948, several other meetings were held between representatives

[4] Glazing subcontractor Hacker was a member of the Association; subcontractor Adler, although not a member at this time, attended the meeting (R. 52, 530-531, 655-656).

of the Union and those of petitioner Association but the parties still failed to come to any agreement (R. 86-88; 276, 359-362, 379-380, 420-421, 428-429, 431-432, 434-435, 440, 512, 538). As revealed by the letters of Association Secretary McCracken, a major reason for the impasse between the Union and the Association was that "this association cannot bargain with you for or in behalf of its member general contractors, none of whom is an employer of the persons you represent" (R. 530-531, 534).

Thereafter, the Union turned to the immediate employers of the glaziers, the two glazing subcontractors. John Hoffman, business agent for the Brotherhood of Painters, who purported to speak for the Union, told glazing subcontractor Hacker that the Union would not refer glaziers to him if he accepted jobs where there was preglazed sash, or from contractors using such sash (R. 88; 274-275, 277-278). Desiring "to live up to the union rules," Hacker decided that he "would not send a glazier on a job without getting an o. k. first" from Hoffman (R. 292, 674-676). Subcontractor Adler also adopted the practice of checking with Hoffman before accepting a new job, and signed the Union's form contract (R. 334, 476-477, 495-496, 676-677).

In February 1948, Hacker was asked to do certain glazing work by John Costa, the owner of a building damaged by fire. Because the carpentry work on the job had been awarded to general contractor Harshbarger, who had not then abandoned the use of preglazed sash, Hacker said, "I think

I had better call Mr. Hoffman so that we won't get the job opened up and then have trouble on it after it is opened" (R. 281). Hoffman subsequently informed Hacker that he "could not work with Walter Harshbarger," and Hacker refused to accept the contract (R. 90; 281-282).

Similarly, in March 1948, general contractor Gregory asked Adler to do certain glazing work on a group of houses which Gregory was building and in which he had installed preglazed sash (R. 90; 446-447). Adler referred Gregory to Hoffman, who stated that the work could not be done because Gregory was "unfair." The preglazed sash was subsequently removed by Gregory, and Adler thereafter performed the required glazing work. (R. 90; 447-448.)

By May 1948, Hacker complained to Hoffman that the situation had become too "complicated," and asked him to furnish "something more definite to work on" (R. 88; 295). A day or two later Hacker received part of a "Union Contractors Directory, 1947" in which the names of fourteen general contractors doing business in Joliet had been checked; attached to this booklet was a note from Hoffman reading, "Friend Geo.—all names mark [*sic*] are O. K., as we go along will notify of any changes" (R. 88; 294-295, 664-670).

In addition to these incidents, which involved Union threats to withhold glaziers from glazing subcontractors working on "unfair" jobs, there were several instances where glaziers—*after* reporting to a job and finding that there was preglazed

material—either walled off or insisted upon replacing the preglazed material. Thus, in April 1948, general contractor Bockholdt was rebuilding a filling station which required the installation of nine large double plate windows. Four glaziers sent to the job found two new preglazed doors, whereupon they stopped the performance of their glazing job until they had first replaced the glass in the doors. (R. 90-91, 576; 449-451, 471.)

Similarly, in June 1948, subcontractor Hacker received an order from the Mazzucco Construction Company to install glass plates in two store fronts of the building occupied by the Grant Hardware Company, and for this purpose he secured three glaziers from the Union in Chicago. These glaziers had commenced installation of the plates when they discovered that preglazed sash had previously been installed on the upper floor of the building. Thereupon Berger, the glazier foreman, phoned Union business agent Meyers in Chicago and advised him of this situation. Meyers replied, "You are on the job. You know the conditions of the job and you know the union rules. Do what is right." Berger reported his conversation with Meyers to the other two glaziers, and they all agreed to leave the job. On learning of their decision, general contractor Mazzucco advised the glaziers, with the consent of the owner of the building, that he would remove the preglazed sash, have new open sash delivered, and have the glaziers glaze all the sash on both floors. This arrangement was satisfactory to the glaziers, who proceeded to

glaze all the sash on both floors of the building. (R. 91-92, 575-576, 304-311, 457-462, 520-521.)

In mid-summer of 1948, Adler's Porter Glass Company received a contract from a Chicago general contractor to do the outside glazing work on a new store which was being built in Joliet for Sears Roebuck & Company. Leonard Ahrens was the sole employee sent to the job, and he began the glazing work. After a day or two, Ahrens requested subcontractor Adler, his employer, not to send him back on that job because preglazed interior show cases were being delivered in the store. Adler thereupon contacted Union business agent Meyers, who asked Adler if he could do the interior work. Adler replied that he could if Meyers would supply him with the necessary men. Subsequently, Adler made arrangements with the general contractor to do all the interior glazing work, including the show cases. The Union furnished additional men for this work, and Ahrens, who had stopped work on discovering the preglazed show cases, returned to the job. (R. 92, 577; 480-486.)

3. *The Board's conclusions and order*

Reading Section 8 (b) (4) (A) of the Act as not interdicting the traditional techniques applied in primary, as distinguished from secondary, labor disputes, the Board concluded that the Union's by-laws against preglazed sash were not in themselves violative of that Section; the by-laws *per se* merely prescribed the conditions under which Union members would work for their immediate employer, the

glazing subcontractor (R. 574-575). The Board further concluded that the Union's refusal to furnish glaziers to "unfair" jobs was not unlawful because such refusals antedated the existence of an employment relation, which relation was an indispensable element of the unfair labor practice defined in Section 8 (b) (4) (A) (R. 572-574, 96-97). However, where the by-laws were invoked after two or more Union glaziers had entered into a particular work assignment, the Board held that this application of the by-laws constituted a violation of Section 8 (b) (4) (A) (R. 575-576).[5]

The Board entered a broad order (R. 578-579) requiring, *inter alia*, that the Union and its agents:

> 1. Cease and desist from applying its by-laws in such a manner as to induce and encourage the members of Local 27, or otherwise inducing or encouraging the members of Local 27, to engage in a strike or a concerted refusal in the course of their employment to perform services for Joliet Paint and Glass Co., or any other employer, where an object thereof is to require their employer or any other employer or other person to cease doing business with any other employer or any person who uses or sells preglazed sash, or has used or sold preglazed sash.

[5] Where, as in the Sears Roebuck incident (p. 10, *supra*), only *one* glazier was involved, the Board did not deem the Union action unlawful because "the words 'concerted' and 'employees in the course of their employment' in Section 8 (b) (4) requires that more than a single employee be involved in order that a violation be found" (R. 577). Cf. *National Labor Relations Board* v. *International Rice Milling Co., Inc.*, 341 U.S. 665, 671.

B. The decision of the court below

The court below agreed that the Union's refusal to assign men to "unfair" jobs did not constitute a strike or a concerted refusal to perform services within the meaning of Section 8 (b) (4) (A), holding that such a violation could occur only after an employment relation had been created (R. 717). The court further agreed that the Union's by-laws against preglazed sash were not illegal *per se* (R. 717).

Unlike the Board, however, the court found that an object of the by-laws themselves was one proscribed by Section 8 (b) (4) (A) (R. 718), and that, standing alone, they constituted inducement or encouragement to Union glaziers (R. 722-723). But, in the light of its earlier conclusion that Section 8 (b) (4) (A) does not proscribe union compulsion exerted prior to the establishment of an employer-employee relation, the court held that the by-laws violated this Section only when they were invoked after the glaziers had accepted employment (R. 717-718).

Accordingly, the court concluded that the order entered by the Board embodied all the relief to which petitioners were entitled, and declined to modify it (R. 721, 724).

ARGUMENT

1. Contrary to petitioners' contention (Pet. 16-20), the holding of the court below—that the refusal of the Union to assign men to enter into an employment relation was neither a strike nor a concerted refusal in the course of employment to

perform services—does not conflict with either *National Labor Relations Board* v. *Denver Bldg. Council,* 341 U. S. 675, or *Carpenters Union* v. *National Labor Relations Board,* 341 U. S. 707. Both of these cases involved the effect of union action on men who were already in an employment relation[6] —not the wholly different situation in issue here, where the glaziers were induced by their union to refrain from entering into such a relation. Both cases sustained the Board's application of Section 8 (b) (4) (A), as does the decision below. Insofar as the instant case involves the type of situation presented in *Denver* and *Carpenters,* the decision of the court below is in full accord with those decisions. Thus, in the Grant Hardware incident (pp. 9-10, *supra*), where the Union's by-laws were invoked to effect a concerted withdrawal of men from the job, the court found that Section 8 (b) (4) (A) had been violated.

Nor is the further holding of the court below—that the Union's by-laws, though themselves constituting inducement and encouragement of member glaziers, were not proscribed by Section 8 (b) (4) (A) *until* they had been invoked after the es-

[6] In *Denver,* the union and non-union employees were at work on the job for about four months before the picketing occurred, and the Court's opinion refers to the decision to picket the job as "a signal in the nature of an order to the members of the affiliated unions *to leave the job* and remain away until otherwise ordered" (341 U. S. at 678-679; emphasis added). Similarly, in the *Carpenters* case, the Court's opinion points out that: "Wednesday, two of the union carpenters *stopped work* for half an hour because of the presence on the job of the nonunion installation workers . . . and, on Thursday, August 21, Henderson came to the project and told the four union carpenters who were *working there* that they *could not continue to work* . . ." (341 U. S. at 710; emphasis added).

tablishment of an employment relation—in conflict with *Electrical Workers v. National Labor Relations Board*, 341 U. S. 694, or *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 193 F. 2d 421 (C.A. 10). (See Pet. 22-24.) These cases emphasize that, under Section 8 (b) (4) (A), the inducement or encouragement of a strike or a concerted refusal is proscribed, even though it does not actually elicit the desired response from the employees. In each of these cases, however, the employees involved were already on the job.[7] Hence, these cases hold no more than that union inducement and encouragement, *after* an employment relation has been established, is forbidden irrespective of whether it proves effective. The conclusion of the court below respecting the Union's by-laws in this case is fully consistent with this rule.

2. On the merits, the decision of the court below is correct and presents no substantial question warranting review by this Court. Section 501(2) of the Labor Management Relations Act (which is applicable to Title I, the National Labor Relations Act, as amended) defines a "strike" as a "concerted stoppage of work by employees . . . and any concerted slow-down or other concerted interruption of operations by employees." Since men cannot stop work or ordinarily interrupt operations before they have accepted employment, the mere refusal to enter into an employment relation falls

[7] See *Electrical Workers* v. *National Labor Relations Board*, 341 U.S. at 696-697; *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 193 F. 2d at 423 (C.A. 10).

outside this definition of "strike." Similarly, the rejection of a job offer does not constitute a concerted refusal to perform services, for, as the court below noted (R. 718), "the plain language" of Section 8 (b) (4) (A) "limits" its proscription to refusals which occur "in the course of" the employees' "employment." Accordingly, the court properly concluded (R. 718) that "employees cannot be on a strike or engaged in a refusal 'in the course of their employment' prior to the establishment of an employer-employee relationship."

Moreover, since an employer-employee relationship is required before there can be an actual strike or concerted refusal to work within the ban of Section 8 (b) (4) (A), it follows that such a relationship must exist before union inducement or encouragement may be held unlawful. For the same phrase in Section 8 (b) (4) (A)—"a strike or a concerted refusal in the course of their employment"—states both the activity a labor organization is forbidden "to engage in" and that which it is forbidden "to induce or encourage the employees of any employer to engage in." Indeed, the very words "employees of any employer" emphasize the necessity for employees to be in the employ of *some* employer before their inducement or encouragement becomes illegal.

Petitioners' contention (Pet. 21-22)—that the course of employment of Union glaziers should be deemed to encompass the whole process by which they are circulated among the various glazing subcontractors—dispenses with the requirement that there be an existing employer-employee relation,

and gives the term "course of employment" a meaning which renders it surplusage in Section 8 (b) (4) (A). In this case (pp. 3-4, *supra*), the Union members, between assignments, were part of a homogeneous pool, without any assurance as to which of numerous unrelated glazing contractors would employ them or for how long; they were not in an employment relation with any particular employer, but were in essence only applicants for glazing work. Had Congress desired to include employees in their position, it would merely have had to provide that "employees" shall not engage in a "concerted refusal . . . to perform any services." Instead, with full knowledge that the term "employee" did not necessarily require an existing employment relation (*Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 187), it chose in Section 8 (b) (4) to use the phrase "employees . . . in the course of their employment." It must be presumed "that so striking a change in expression could only have proceeded from a deliberate difference of intent." *Securities & Exchange Commission* v. *Robert Collier & Co.,* 76 F. 2d 939 (C.A. 2, Learned Hand, J.)

The propriety of the interpretation adopted by the court below is not impaired by the circumstance which it frankly acknowledged that "if two or more glaziers refuse to accept employment because of the use of preglazed sash there is no violation. . . . However, if they discover the use of preglazed sash after they are on the job and then refuse to work, it is a violation . . ." (R. 723-724). For, as the court pointed out (R. 724), "these incon-

gruities and others which could be mentioned are unavoidable because of the plain unambiguous language employed by Congress in enumerating the elements required to constitute a violation." "If Congress had intended to proscribe the refusal to accept employment either individually or in concert, it no doubt would have employed language appropriate to accomplish such purpose" (R. 718). The holding that Congress did not proscribe refusals to accept employment recognizes the compromise character of this legislation; it is part of the same pattern reflected by holdings that Congress, although proscribing an actual strike, did not outlaw strike threats addressed to employers,[8] or that, although proscribing "stand-by" practices, it did not cover "make-work" practices which are equally useless to the employer.[9]

There is no merit in petitioners' contention (Pet. 24-26) that the effect of the decision below is to eliminate "area product boycotts" from the coverage of Section 8 (b) (4) (A). Although the court found that Congress intended to reach such boycotts and that this was the Union's object here, it properly emphasized (R. 716) that "the conduct and activities of the Union . . . do not constitute an unfair labor practice either when considered separately or in their entirety unless prohibited by the language employed in Sec. 8 (b) (4) (A) of the Act. . . . [I]t is the law which Congress

[8] See *Rabouin* v. *National Labor Relations Board*, 195 F. 2d 906, 912 (C.A. 2).

[9] See *American Newspaper Publishers Assn.* v. *National Labor Relations Board*, 345 U.S. 100; *National Labor Relations Board* v. *Gamble Enterprises*, 345 U.S. 117.

finally enacted by which the merits of the controversy must be determined." Turning to Section 8 (b) (4) (A) as enacted, the court found (R. 717) that "the objective sought to be accomplished by the union, while material, is alone not sufficient; it only becomes a violation when achieved in the manner specified, that is, by engaging in a strike or by inducing or encouraging employees to do so or to engage in a concerted refusal in the course of their employment."

In accordance with the plain language of Section 8 (b) (4) (A), the decision below requires that the objective to ban a product must be implemented by the means specifically proscribed by the statute. When so implemented, area product boycotts are forbidden, as is amply demonstrated by *Washington-Oregon Shingle Weavers District Council, et al., and Sound Shingle Co.,* 101 NLRB No. 203. Petitioners' fears, that this requirement may impair the effectiveness of Section 8 (b) (4) (A) insofar as the construction industry is concerned (Pet. 26-28), are more properly addressed to Congress than to the courts, as one of petitioner's counsel has recognized elsewhere.[10]

3. In the almost six years since the amended Act has been in effect, the question whether Section 8 (b) (4) (A) proscribes the refusal of a union

[10] In the hearings recently conducted by the House Labor Committee for the purpose of considering amendments to the Act, one of petitioners' counsel appeared before the Committee to urge that Section 8 (b) (4) (A) be amended to cover union refusals to assign men to jobs. Hearings before the House Committee on Education and Labor, on H. Res. 115, 83rd Cong., 1st Sess., pp. 3452 ff.

to refer men for the purpose of entering into an employment relation has arisen very infrequently. The instant case is the only one to reach the Board where it was necessary to decide the question; the overwhelming majority of the Board's regional offices report that they have not had any cases involving the problem; and the remaining offices report but one or two cases, which have been disposed of informally. In short, the question here presented has not thus far been of substantial importance in the administration of the Act.

CONCLUSION

The decision below is not in conflict with decisions of this or other courts; it presents no substantial question warranting review; and the question which it involves has been relatively unimportant in the administration of the Act. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorney,
National Labor Relations Board.

AUGUST, 1953.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C., Supp. V, Secs. 141, *et seq.*), are as follows:

* * * * *

TITLE I—Amendment of National Labor Relations Act.

* * * * *

DEFINITIONS

Sec. 2. When used in this Act—

* * * * *

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

UNFAIR LABOR PRACTICES

Sec. 8. * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

* * * * *

TITLE V

DEFINITIONS

SEC. 501. When used in this Act— * * *

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

(3) The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "representative", "person", and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 173

JOLIET CONTRACTORS ASSOCIATION, ET AL.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

GLAZIERS' UNION, LOCAL NO. 27 OF THE BROTHERHOOD OF PAINTERS, DECORATORS AND PAPER HANGERS OF AMERICA,
Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF GLAZIERS' UNION, LOCAL NO. 27 OF THE BROTHERHOOD OF PAINTERS, DECORATORS AND PAPER HANGERS OF AMERICA IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the court below (R. 714-724) is reported at 202 F. 2d 606. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 570-583) are reported at 99 N. L. R. B. 1391.

JURISDICTION.

On June 30, 1952, the Board issued its order (R. 578-579) against the Glaziers' Union, Local No. 27 of the Brotherhood of Painters, Decorators and Paper Hangers of America, herein called the Union, which remedied certain conduct found to be unlawful, and dismissed the unfair labor practice complaint insofar as it alleged other violations of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. A. Secs. 151, *et seq.*). Thereafter, the petitioners filed in the court below a petition to review and modify the order of the Board (R. 551-569). The Board did not petition for enforcement of the remedial portion of its order because the Union had complied therewith. On December 10, 1952, the court below granted leave to the Union to intervene (R. 712). The Union filed its brief and participated in the oral argument in the court below (R. 713, 715). On February 10, 1953, the court below filed its opinion in which it concluded that the petition to review and modify the order of the Board should be denied (R. 714-724). On February 25, 1953, the petitioners filed a petition for rehearing (R. 725-733). On April 13, 1953, the petition for rehearing was denied (R. 734). The decree of the court below, denying the petition to review and modify the Board's order, was entered on June 26, 1953 (R. 739-740). The petition for a writ of certiorari was filed on July 11, 1953. The jurisdiction of this Court is involved under 28 U. S. C. 1254.

STATUTE INVOLVED.

The pertinent provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. A. Sec. 141, *et seq.*) are set forth in the petition, pp. 2-3.

SUMMARY OF ARGUMENT.

The decision of the court below, which denied the petition to review and modify the order of the Board, presents neither a conflict of decisions nor any substantial question warranting review. The Board in this case found that the Union had violated Section 8 (b)(4)(A) of the Act and entered a broad cease and desist order against the Union and its agents. Although it is difficult to know exactly what petitioners are seeking by their petition to review and modify the order of the Board, apparently petitioners are asking that further findings be made by this Court, which were not made by the Board nor by the court below, and that a far broader order be entered against the Union. The court below pointed out that while it disagreed with the Board as to its conclusions concerning certain incidents, it felt that the order which the Board imposed upon the Union afforded to the petitioners all the relief to which they are entitled. Contrary to petitioners' contentions, this case presents no special or important reasons warranting a review on writ of certiorari.

ARGUMENT.

The findings of the Board being fully set forth in its decision and order dated June 30, 1952 (R. 570-582; 99 N. L. R. B. 1391), and the accompanying Trial Examiner's intermediate report (R. 78-109; 99 N. L. R. B. 1400), there is no need for burdening this Court with a further detailed statement. The Board concluded that the Union had violated Section 8(b)(4)(A) of the Act only in connection with the Grant Hardware incident. Even though the Board found that the Union's by-laws and working rules were not *per se* violative of Section 8(b)(4)(A) of the Act (R. 574-575, 99), the Board concluded, however, that in the Grant Hardware incident the existence of the by-laws was part of the inducing and encouraging of employees of glazing subcontractor Hacker of Joliet Paint and Glass to cease work, an object of this conduct being to cause Joliet Paint and Glass to cease doing business with general contractor Mazzucco (R. 574-576).

The Board's cease and desist order very broadly prevents the Union from violating Section 8(b)(4)(A) of the Act, whether through the misapplication of its by-laws or through any other action. The Board's order directs that the Union and its agents shall (R. 578-579):

> 1. Cease and desist from applying its by-laws in such a manner as to induce and encourage the members of Local No. 27, or otherwise inducing or encouraging the members of Local No. 27 to engage in a strike or a concerted refusal in the course of their employment to perform services for Joliet Paint and Glass Co., or any other employer, where an object thereof is to require their employer or any other employer or other person to cease doing business with any other employer or

any person who uses or sells preglazed sash, or has used or sold preglazed sash.

The order further dictates certain affirmative steps to be taken by the Union with respect to the notification of its members and the Board's Regional Director to assure compliance with the Act.

The court below concluded that the facts of still another incident, the Bockholdt incident, also constituted a violation of Section 8(b)(4)(A) of the Act. But the court below pointed to the broad order issued by the Board and emphasized this fundamental consideration (R. 721):

> "We are of the view that the restraint thus imposed upon the Union embodies substantially all the relief to which petitioners are entitled and no good purpose could be served in considering each incident separately with a view of determining whether it constitutes a violation. In other words, it is not discernible how it would make any difference in the form of the order whether it was predicated upon one violation, as the Board found, or other violations which we think the Board should have found."

The fundamental problem in this case is that it is practically impossible to determine exactly what petitioners want. In the first place, the petitioners persist in arguing on the basis of facts which were never found by the Board. The so-called summary of facts set forth in the petition (pp. 5-13) is not accurate and represents the facts as petitioners would have them, despite the complete findings made by the Board, supported by substantial evidence on the record as a whole, and passed upon by the court below.

For example, the petition contains the following statements (pp. 5-6):

> "The Union is affiliated with the Building Trades Councils in Joliet and other cities within its jurisdiction (R. 330-331). A purpose of such affiliations is that

other trade unions will aid in enforcing its rules and regulations even to the extent of work stoppages by other crafts (R. 538, 336, 442)."

No such findings were made by the Board, nor is there support in the record for this implication that other labor unions have exercised or will exercise any persuasion or pressure upon petitioners to cause them either to cease using preglazed sash or to employ only union glaziers. Indeed, the evidence conclusively establishes the contrary and discloses that members of the Carpenters' Union have regularly installed preglazed sash (R. 423-4, 449, 450, 676, 678). The record makes it clear that on no occasion whatever has a carpenter or member of another organization ever refused or threatened to refuse to work on any project because of the presence of preglazed sash or the absence of union glaziers.

Similarly, the petition alleges that general contractors were refused glaziers (pp. 10-12, 17) by the Union. It is significant that the Board made no such finding of fact and took pains to point out that:

> "We need not decide * * * whether the Respondent (the Union) actually refused any request for glaziers." (R. 572; 99 N. L. R. B. 1392.)

This Court's attention should be directed to the important consideration that as a matter of fact there never was any refusal on the part of the Union to furnish glaziers. The record establishes beyond a doubt that Hacker and Adler, the glazing contractors in Joliet, always received glaziers when they called the Union office in Chicago (R. 260, 473-5, 673, 674). And when a glazing contractor requested men from the Chicago office, he was never asked what job they were to work on or what general contractor was involved (R. 678, 680-682).

Nevertheless, what petitioners are actually seeking by

their petition to review and modify the Board's order is based upon an assumed refusal on the part of the Union to furnish employees to Joliet glazing subcontractors for particular jobs. As we have noted above, there is no evidence in the record that any subcontractor was ever refused an employee for any particular job. Petitioners' primary attack against the Union, and the ultimate order desired, therefore, is built up from a non-existent fact (R. 565). Petitioners appear to be demanding that the Union must always furnish employees to any employer on his request. This concept is so contrary to established standards of Union conduct and of due process, that we desire to answer it on its own terms.

As we have stated above, the Board's cease and desist order sets out, in sweeping language, the type of conduct by the Union which is prohibited by the Act. The order is drafted in the full language of the statute as it applies to the Union's activities in Joliet; it prohibits the Union from taking *any action* which will violate Section 8(b)(4)(A). The order is not limited to the misuse of Union by-laws, but applies to all types of Union activity.

Despite the strong protection thus granted them, petitioners appear to be seeking an order of far greater breadth (R. 565). They ask for an order which, in our opinion, would force the Union to engage in violations of other subsections of Section 8 (b), and would violate the Union's and each individual glazier's basic right to refuse employment which he does not want.

It is well known that one of the most important labor policies introduced by the Labor-Management Relations Act of 1947 was the regulation of union security. Sections 8(a)(1), 8(a)(3), 8(b)(1) and 8(b)(2) place strict limitations upon the union's security arrangements that can be established and make illegal a closed shop or union preferential hiring system.

While petitioners speak critically of the Union's alleged hiring hall (pp. 7, 24), they, nevertheless, are themselves asking for as rigid a hiring hall system as can be imagined. Petitioners ask, in effect, that the Union be ordered to transform itself into a compulsory employment agency whereby it will have to comply with every request for glazing employees that any Joliet employer ever makes. It will have to assert formal or informal disciplinary measures against its members to force them to accept positions with any Joliet employer who requests their services, lest the Union be penalized for failing to fill a demand for employees. On the basis of the order sought by petitioners, the Union's agents, instead of acting in the interests of the membership, will become agents of the Joliet Contractors Association, and the other petitioners. This is compulsory unionism with a vengeance. If the order is enforced by government action, then we have the free trade union transformed into the slave union of the totalitarian state.

We submit that there is nothing in the Act which prohibits a worker or his agent from specifying the working conditions under which he will work. There is similarly nothing in the Act which forces a man to work against his will or which compels a union to send men to employers upon the asking. A union cannot be ordered to function as a hiring hall or as a compulsory employment agency against its will, because such compulsion would not only be violative of the Fifth and Thirteenth Amendments to the Constitution of the United States, but would also contravene the provisions of the National Labor Relations Act prohibiting "closed shop" and "hiring-hall" systems.

If a glazing contractor could compel the Union to assign men to him upon his asking, then the Union, or rather the Union officers or employees, would have to perform work for that glazing contractor without getting paid for it; they

would have to check the lists of their members, find out whether there are men available for work, contact the men and then direct them to get in touch with the glazing contractor. All this work would be performed under compulsion of law—under the threat of contempt procedures. Not only is that depriving the Union and the Union officers and employees of property without due process of law, but it is, above all, contrary to all our basic principles of democracy. Such compulsion would also mean that the individual Union workers directed by the Union to work for a certain glazing contractor would be apprehensive to decline the Union's requests; knowing of the order which forces their Union to act as a compulsory employment agency, it is quite natural to assume that they will harbor the belief as laymen that they must work for the contractor whether they like it or not, because otherwise they themselves or their organization might be punished. Thus, the effect of such an order would be clearly in violation of the Thirteenth Amendment prohibiting involuntary servitude. The court below was fully aware of the grave constitutional considerations posed by the order sought by the petitioners and made these significant statements (R. 717):

> "We also agree with the Board that the mere refusal on the part of the Union to permit its members to work on a job where preglazed sash is used or a concerted refusal on the part of the employees to do so, does not come within the condemnation of the statute. This is so because the plain language limits the activities to 'employees * * * in the course of their employment.' We agree with the view that employees cannot be on a strike or engaged in a refusal 'in the course of their employment' prior to the establishment of an employer-employee relationship. If Congress had intended to proscribe the refusal to accept employment, either individually or in concert, it no doubt would have employed language appropriate to accomplish such purpose. We suspect that Congress deliberately refrained

> from so doing in order to escape a serious constitutional challenge. At any rate, we would doubt the power of Congress to make the refusal to work an unfair labor practice. So far as we are aware, people have a right either as individuals or groups to refuse to work for any reason which they may regard as sufficient or for no reason. It is only after the employer-employee relationship has been established that Congress has prescribed a code of conduct for both employer and employee in which it has specifically designated that which constitutes an unfair labor practice on the part of the parties respectively."

Instead of being in conflict with the decisions of this Court, the court below demonstrated clearly that it was following the principles established by the court. The court below said:

> "We think the decisions of the Supreme Court sustain the view that the heart of Sec. 8(b)(4) insofar is it brings a union within its terms is that either the union must engage in a strike or that it induce or encourage employees to do so or to engage in a concerted refusal to work in the course of their employment."

We believe that it is clear from the record in this proceeding, as found by the Board and upheld by the court below, that the Union did not "engage in" or "induce or encourage the employees of any employer to engage in a strike." We submit that the Board's logic was irrefutable when it stated in its decision and order, "The broadest definition of strike includes 'quitting work' or 'a stoppage of work.' Men cannot quit before they are hired; they cannot stop work before they start" (R. 573). The Act, reason and unanimous authority reject the petitioners' constantly asserted contention that the mere refusal of persons to accept employment offered them is a "strike".

Consequently, even if it were proved—which it was not—that the Union had refused to send glaziers out to work for

the subcontractors, such a refusal could never constitute a strike. Nor could the Union "induce or encourage" glaziers to engage in a strike, when they had not yet been employed.

The record also establishes that the Union did not, with the exception of the Grant Hardware incident, "induce or encourage the employees of any employer to engage in * * * a concerted refusal in the course of their employment." The draftsmen of the Labor-Management Relations Act, 1947, included a large number of lawyers. Such competent and outstanding lawyers did not include a phrase like "course of their employment" without any consideration for its legal meaning. The term "course of employment" has had a great deal of definition and interpretation by the courts and there is no question about this proposition: *it is axiomatic that an act cannot occur in the course of a person's employment unless the person is actually employed and engaged in the employment at the time the act occurs.* 58 Am. Jur., Workmen's Compensation, Sec. 212; *Miller* v. *T. H. Browning S. S. Co., Inc.*, 73 F. S. 185 (D. C. W. D. N. Y., 1947); *Olson* v. *Hurlbert Sherman Hotel Co.*, 210 App. Div. 537, 206 N. Y. S. 427 (1924); *Isabelle* v. *J. H. Bode & Co.*, 215 App. Div., 184, 213 N. Y. S. 185 (1926); *Meem-Haskins Coal Corporation* v. *Watts*, 242 Ky. 643, 47 S. W. 2d 82 (1932).

The petitioners urge that the holding of the court below is in conflict with the decisions of this Court handed down on June 4, 1951, dealing with union unfair labor practices arising under Section 8(b)(4)(A), in the cases of *N. L. R. B.* v. *International Rice Milling Co.*, 341 U. S. 665; *N. L. R. B.* v. *Denver Building & Construction Trades Council*, 341 U. S. 675; *International Brotherhood of Electrical Workers* v. *N. L. R. B.*, 341 U. S. 694; and *Local 74, United Brotherhood of Carpenters & Joiners of America* v. *N. L. R. B.*, 341 U. S. 707. In two of these cases, the decisions of

the Court of Appeals were reversed; in two they were affirmed. In each of the four cases this Court affirmed the order and decision of the Board. The opinion of the court in each of these cases was written by Justice Burton, who said in the *Denver Building and Construction Trades Council* decision:

> "Not only are the findings of the Board conclusive with respect to questions of fact in this field when supported by substantial evidence on the record as a whole, but the Board's interpretation of the Act and the Board's application of it in doubtful situations are entitled to weight. In the views of the Board as applied to this case we find conformity with the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." (341 U. S. at pages 692-3.)

The Supreme Court, in these four cases, has expressed its fundamental opinions concerning the interpretation of cases under Section 8(b)(4)(A) of the Act. Admittedly, the analysis of this section and its consistent application to individual cases is extremely difficult. There are few cases in this field which present easy questions for decision. This Court, we believe, drew attention to this difficulty of decision, and, pointing to the determinations made by the Board, took judicial notice of the need for experts in this narrow branch of the law. This Court approved the Board's basic interpretations of Section 8(b)(4)(A), and then left to the Board, we submit, the job of continuing to apply the law to new situations as they arise. This responsibility, we feel, has been exercised by the Board in full keeping with the decisions of this Court and with the approval of the court below.

Contrary to the contention of the petitioners, the holding

of the court below is not in conflict with the decisions of this Court of June 4, 1951. The petitioner fails to point out that in each of the cases decided by this Court the union engaged in overt acts and conduct found to be violative of the Act. In the *Denver* case, the *Rice Milling* case and the *International Brotherhood of Electrical Workers* (*Langer*) case, pickets had been posted and a picket line established by the union charged with engaging in unfair labor practices. In the *Local 74, United Brotherhood of Carpenters and Joiners* (*Watson*) case, the union ordered its members off the job, it ordered them to engage in a strike; the business agent of the union "came to the project and told the four union carpenters who were working there that they could not continue to work with nonunion men or where nonunion men were employed" (341 U. S. 707, 710).

In the present case, on the other hand, the Union engaged in no picketing whatever and the only overt acts or conduct found by the Board to be violative of the Act occurred in the Grant Hardware incident. As to this incident, the Board's order strikes at the forbidden Union activity and employs the broad language of the statute. We submit, as found by the court below, that the Board has dealt comprehensively with the situation before it and no further order can be supported in law. There is plainly no merit in the suggestion of petitioners that this case presents a conflict of decisions or any question which warrants review.

In *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 488, this Court stated:

> "To be sure, the requirement for canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge,

whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect."

In the present proceeding, the Board gave full consideration to the facts and applied the complicated provisions of Section 8(b)(4)(A) in keeping with these facts and the decisions handed down by this Court. Actually the Board divided in its decision, three members of the Board finding that an unfair labor practice had been committed in connection with the Grant Hardware incident, while two members of the Board concluded that even this single occurrence did not make out an unfair labor practice and that the complaint should have been dismissed in its entirety.

Moreover, the decision and order of the Board was found by the court below to be clearly in accord with the law and supported by substantial evidence on the record considered as a whole.

CONCLUSION.

The decision below, denying the petition to review and modify the Board's findings and order, is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 173

JOLIET CONTRACTORS ASSOCIATION, ET AL.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

GLAZIERS' UNION, LOCAL NO. 27 OF THE BROTHERHOOD OF PAINTERS, DECORATORS AND PAPER HANGERS OF AMERICA,
Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

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The Board's brief in opposition requires a reply.

The Board deals with only one of the several questions presented, namely, the question whether or not union glaziers unassigned in the hiring hall pool are in an employer-employee relationship and whether or not Section 8(b) (4) (A) requires that there be a common law employer-employee relationship before the Act can apply. This is only one of the several questions presented by our petition.

The Board fails to make any argument in opposition to the questions raised with respect to union glaziers regu-

larly at work on jobs in Joliet throughout the entire period involved in this case. One of the principal questions raised by our petition is whether or not as to such employees the Act is directed at union action and conduct or at employee action and conduct.

Specifically, question is raised whether or not the Union's inducement and encouragement of union glaziers to engage in a concerted refusal to perform services where preglazed sash was used is a violation only when and to the extent that particular glaziers actually refuse to work. The court below held that it was no offense for the Union to induce or encourage union glaziers to refuse to perform services until union glaziers had actually walked off jobs on which they were working. The Board's brief is silent on this question, although its statement of the case acknowledges that throughout the boycott period union glaziers were regularly and continuously employed by and engaged in work for the glazing contractors in Joliet and that during the boycott period numerous other glaziers were actually working for such glazing contractors (Bd. 3, n. 2; Bd. 4, n. 3; see Pet. 21).

We pointed out that such a holding was in conflict with the *Electrical Workers* and *Carpenters* cases. We also pointed out that it is in conflict with *N. L. R. B.* v. *Denver Bldg. & Const. Tr. Coun.*, 193 F. 2d 421, 424 (C. A. 10, 1952), and other cases (Pet. 23, 24).

We also pointed out that this same conflict appears with respect to the other facet of Section 8(b) (4) (A)—the Union itself engaging in a strike or concerted refusal to work as distinguished from the employees' action in response thereto.

The Board Concedes the Conflict With Electrical Workers and Carpenters Cases With Regard to Union Glaziers Regularly at Work.

The Board admits that the *Electrical Workers* and *Carpenters* cases hold that the Union is proscribed from inducing or encouraging a strike or concerted refusal "even though it does not actually elicit the desired response from the employees" (Bd. 14). Arguing only that the words of the Act "in the course of their employment" require an employer-employee relationship the Board concedes that this language does not require a strike or concerted refusal to work. This was the point made in our petition (Pet. 22-24).

The court below held the contrary. It held that although the union by-laws and working rules standing alone constituted a continuing inducement or encouragement to the union glaziers to strike and concertedly refuse to work (R. 722, 723; Bd. 2, 5), "until they (the union glaziers) have done so they are not contaminated with illegality" (R. 717). Consistent with this holding, the court below found that only in the Grant Hardware and Bockholdt incidents were there any violations, because in those incidents union glaziers actually left their jobs because of the union by-laws and rules (R. 717, 721-723). Also consistent with this holding, the court below thought adequate a cease and desist order which merely prohibited the Union from "applying its by-laws" (R. 721) in a manner to induce or encourage the union glaziers to a strike or concerted refusal to work in the course of their employment.

Thus, the Board's argument admits the conflict with regard to the basic question here: Whether or not a union engaged in inducing and encouraging its members to strike or concertedly refuse to work for an illegal object violates the Act only when and to the extent that inducement

and encouragement reaches fruition by employees leaving their jobs.

It is no answer to say, as the Board does (Bd. 12, 13), that there must be an employment relationship, because it is admitted that there were union glaziers at work in Joliet during the entire period here involved, some of whom left their jobs (Grant Hardware and Bockholdt incidents) and some of whom did not. The employees working in Joliet were in an "employment relation" with Joliet contractors even under the Board's narrow construction, and the court found that as to these (as well as all other) union glaziers, the by-laws standing alone constituted a continuing inducement and encouragement against work on boycotted jobs (R. 722, 723; Bd. 2). The question is whether or not those employees must actually leave their jobs as the result of the inducement or encourageemnt of the Union before the Union has violated the Act, and on this question there is basic conflict.

The Unassigned Glaziers in the Union Pool (as Distinguished from Union Glaziers Regularly at Work).

The Board's brief confines itself almost entirely to questions with respect to the unassigned glaziers in the union pool.

It argues that union action, no matter how flagrantly contrary to the purpose of the Act, cannot be an offense unless there are union glaziers actually at work on a job. It says that a union cannot be engaged in, or induce or encourage employees to engage in, a strike or concerted refusal to work with respect to union glaziers in a revolving pool who are at the moment unassigned. Its reason for so concluding is disclosed in its statements (Bd. 15) that "employees cannot be on a strike or engaged in a refusal 'in the course of their employment' prior to the establishment

of an employer-employee relationship'' and, again (Bd. 16), "Had Congress desired to include employees in their position (the pool), it would merely have provided that 'employees' shall not engage in a 'concerted refusal * * * to perform any services'." Thus, its concept of the meaning of the words "in the course of their employment" is that to be an offense the members of the union while they are at work must strike or concertedly refuse to work. Here, again, is revealed the same conflict of theory previously discussed, *i. e.*, the lower court's view that there is no offense until employees take action, as contrasted with the construction of this Court and others that it is union conduct that constitutes the offense and not the action taken by particular employees pursuant to the union action. *Electrical Workers* v. *Labor Board,* 341 U. S. 694, 700 (1951); *N. L. R. B.* v. *Denver Bldg. & Const. Tr. Coun.,* 193 F. 2d 421, 424 (C. A. 10, 1952).

The Board makes no satisfactory explanation why the words "in the course of their employment" must be given a narrow common law construction when there is a construction consistent with the purpose of the Act. Its statement to this effect is only a conclusion unsupported by any legal precedent in Labor Act cases. The court below adopted a common law concept of the term "in the course of their employment" such as might be applied in workmen's compensation cases wholly ignoring the fact that the courts have uniformly held that this Act must be read liberally in the light of its broad remedial objectives and the end to be attained. *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 192 (1941). *N. L. R. B.* v. *Armour & Co.,* 154 F. 2d 570, 574 (C. A. 10, 1946). Cf. *United States* v. *American Trucking Association,* 310 U. S. 534, 543 (1940), and *United States* v. *Dickerson,* 310 U. S. 554, 561 (1940). It is no answer for the Board to say of *Phelps Dodge* (Bd. 16) that it only dealt with the word "employee." *Phelps Dodge* established the principle that this

Act should be broadly construed to effectuate congressional objectives. It abandoned a common law meaning of the word "employee" and gave it a meaning consistent with the purpose of the Act. In accordance with *Phelps Dodge*, the term "in the course of their employment" should not be given a common law meaning[1] but a meaning which will effectuate the admitted congressional intent to eliminate secondary boycotts in the construction field (Bd. 17).

The term "in the course of their employment" as used in the Act means only that union action (whether strike or concerted refusal to work or inducing or encouraging employees to do so) must relate to or deal with an employee's work or occupation as distinguished from matters that do not affect his work or occupation, such as consumer boycotts by employees. It means that the union action is directed at or concerns employment—not that there must be a specific employer-employee relationship at any particular time. Otherwise Section 8(b)(4)(A) is ineffective because the Union can accomplish its boycott objectives by simply refusing to assign any glaziers for work in Joliet and prevent the creation of technical employer-employee relationships. There is no difference in boycott effect whether the Union stops work after a man is on a job or prevents him from going on the job in the first place. Nothing in the Act requires that the words "in the course of their employment" must be given a narrow construction inconsistent with the end to be attained by the Act.

But even assuming that the term "in the course of their employment" contemplates an "employer-employee relationship" the Board fails to demonstrate that there is not such a relationship here between union glaziers in the hiring hall pool and the glazing contractors served by the pool. It merely states that there is not such a relationship. The

1. See also, cases at p. 7 hereof in which provisions of the act relating to specific employer-employee relationships were broadly construed.

Board's own cases have consistently held that union members working in a union hiring hall pool are in a continuing employer-employee relationship with the group of employers served by the pool. Illustrative is *Alaska Packers Association*, 7 N. L. R. B. 141, 146 (1938) where it held that union members under a hiring hall system who worked from time to time for one or more of a group of employers were in a continuous employer-employee relationship.[2] Similar holdings were made in *George G. Averill, etc.*, 13 N. L. R. B. 411, 421 (1939); *American Fruit Growers, Inc., etc.*, 10 N. L. R. B. 316, 329 (1938); *United Fuel Gas Company*, 50 N. L. R. B. 22 (1943); *Shipowners' Association, etc.*, 7 N. L. R. B. 1002 (1938). For seventeen years the Board has enjoyed remarkable success in convincing the courts that the broad remedial objectives of the Act require the application of liberal rules of construction. Yet, in this case which involves a type of boycott which it is conceded Congress intended to abolish, we find the Board contending for a construction that would in effect nullify the secondary boycott provisions of the Act and permit this Union to continue a boycott of preglazed sash in Joliet. The Board's brief does not attempt to answer the inconsistency between its own decisions and the holding of the court below

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2. This case involves Section 8(a)(5) which requires an *employer* to bargain with representatives of *his employes*. The Board said (p. 146):

> "The evidence is clear, however, that an *employer-employee relationship* exists between these cannery workers as a group and the Companies. The record shows that the great majority of these workers return season after season to work for one or another of these Companies. *The fact that, as individuals, they may not work for the same Company season after season, does not in any way deprive them of the relationship which they have with all three Companies as a group.* In this respect, their status is comparable to that of longshoremen whose employment shifts from day to day among a small group of employers. * * * *The record indicates that they constitute a clearly defined group of men to whom the Companies turn year after year for their requirements.*" (Emphasis added.)

The Importance of the Case.

The Board's statement that the questions involved are "relatively unimportant" is not even a fair conclusion from the Board's own statement of the case. That statement discloses a determined effort by the Union to eliminate the use of all preglazed sash in Joliet just as it has done in Chicago. Its by-laws and working rules prevent union glaziers from working on any job where preglazed sash is used or on any job being erected by a general contractor who uses preglazed sash. The court below found, and the Board's brief recognizes, that this is a "grandiose plan" to eliminate preglazed sash in Joliet and to compel all union glaziers to refuse their services for an admittedly illegal object (R. 716; Bd. 2). Congress intended to reach such boycotts (Bd. 17).

No more important case has reached this Court or any court under the secondary boycott provisions of the Act. It concerns a secondary boycott of a product from an entire area, not merely a boycott involving a particular job or even a particular contractor. A review of this case is necessary to determine whether or not area product boycotts can continue under by-laws and working rules such as are involved here.

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